

Fair Political Practices Commission
MEMORANDUM

TO: Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

FROM: C. Scott Tocher, Counsel, Legal Division
Luisa Menchaca, General Counsel

DATE: October 1, 2001

SUBJECT: Implementation of Proposition 34; Adoption of Emergency Regulation
18543 Concerning Lifting of Voluntary Expenditure Limits

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On November 7, 2000, the voters approved Proposition 34, which significantly amended the Political Reform Act ("Act"). Among other things, Proposition 34 established a voluntary expenditure limit system for candidates for elective state office. Pursuant to this scheme, candidates may elect to abide by predetermined limits on campaign expenditures for a given election. Section 85402 provides, however, that candidates who declare their intent to abide by those limits are relieved of that obligation if another candidate contributes personal funds to his or her own campaign in excess of the applicable limits for that office.

Two issues arise which require the Commission's attention. First, if a candidate in a *primary* election contributes personal funds in excess of the expenditure limits, and thereby triggers the release of other candidates to exceed the limits, even if they already have indicated their commitment to abide by them, are *all* candidates relieved from that commitment, or only those who are candidates for the same party's nomination as the candidate who contributed personal funds? Second, if personal funds are contributed in the primary election as described above, what is the impact of that contribution on the expenditure limits in the *general* election?

To implement the new statute, staff has drafted several versions of a proposed regulation that answers these questions. So that candidates will have these answers in a timely fashion, staff proposes the Commission adopt a regulation on an emergency basis.

Lifting Expenditure Limits

Article 4 of Chapter 5 of the Act establishes voluntary expenditure limits for elective state office. (§ 85400.) For instance, Assembly candidates who declare their intention to abide by the limits may not make campaign expenditures in excess of \$400,000 in the primary or special primary election and \$700,000 in the general, or

special runoff election. (§ 85400, subd. (1).) Because the federal constitution protects a candidate's use of personal funds, section 85402 seeks to level the playing field for candidates who have agreed to abide by the expenditure limits yet face an opponent who contributes personal funds that exceed the expenditure limits for an election. Section 85402 provides:

“85402. Lifting Expenditure Limits; Opponent's Use of Personal Funds.

“(a) Any candidate for elective state office who has filed a statement accepting the voluntary expenditure limits is not bound by those limits if an opposing candidate contributes personal funds to his or her own campaign in excess of the limits set forth in Section 85400.

“(b) The commission shall require by regulation timely notification by candidates for elective state office who make personal contributions to their own campaign.”

In Regulation 18542, the Commission instructs candidates to notify the Secretary of State within 24 hours of making personal contributions to his or her campaign in excess of the limits set forth in section 85400.

Neither the Act nor section 85402 defines “opposing candidate.” Nor does section 85402 address the interaction of section 85402 between conduct in a primary election and any consequences for the general election. While one can safely say that a candidate in a *general* election who contributes personal funds in excess of the limits relieves all opposing candidates (regardless of party affiliation) from abiding by the limits in that same general election, **it is not so clear with respect to conduct in a *primary* election and its impact on the ensuing general election.** The answers to the two questions below largely will depend on the Commission's conclusions as to whether a policy of encouraging expenditure limits should be pursued and whether the regulation should protect against unfair gaming of the system.

Issue 1: Does the Contribution of Personal Funds by a Candidate for One Party's Nomination in a Primary Election Lift the Limits for All Candidates, Or Only Those Competing for the Same Party's Nomination?

As stated above, the term “opposing candidate,” as used in subdivision (a) of section 85402, is not defined. In a general election, this term poses no problem of interpretation – any two or more candidates for the same office are “opposing” candidates. A primary or special primary election, however, is actually an election to determine a given party's nominee for the general or special general election. Thus, one's “opponent” in a primary election, arguably, is anyone competing for the same party's nomination. If there is only one candidate for a party's nomination in a primary election, it is usually said that the candidate is running unopposed.

The notion of two separate elections, as described above, comports with common sense and is consistent with the Act's treatment of primary versus general elections. For instance, the expenditure limits themselves are different for each election. Moreover, the contribution limits contained in Article 3 of Chapter 5 of the Act are applied separately to the primary and general election – such that the \$3,000 per-election limit of section 85301, subdivision (a), means a limit of \$3,000 for the primary and \$3,000 for the general, making a total of \$6,000 for a candidate over the two elections.

On the other hand, for purposes of the candidate's declaration of acceptance or rejection of expenditure ceilings, section 85401, a candidate must indicate so when the candidate files a statement of intention. If the candidate accepts the limits, he or she may not later amend the statement of intention to reject them.¹ A candidate does not file another statement declaring intent for the general election. In this manner, it is possible to argue the two elections are treated as one for purposes of declaring an intent regarding the expenditure limits. It could be said in response, however, that the choice is effective for both elections, showing agreement that there are two elections.

Nothing in the voter pamphlet guide sheds any light on the statute's intent. Turning to policy considerations, however, one can imagine scenarios in which limiting the lifting of the ban only for same-party candidates² would *discourage* candidates from electing to abide by the limits at all, or might give an unfair advantage to incumbents. For instance, assume an incumbent Assembly member is running unopposed for his Green Party's nomination in the primary, and two Peace and Freedom Party candidates are vying in the primary for the Peace and Freedom nomination. Also assume each Peace and Freedom candidate has committed to abide by the expenditure limits while the Green Party candidate has rejected them. The limit in an Assembly primary race is \$400,000. In the primary, the Green Party candidate contributes personal funds, two million dollars, and airs television ads touting his candidacy throughout the primary election. If the lifting of the ban applies only to same-party candidates, neither Peace and Freedom candidate will be able to match the spending of the richer incumbent. The incumbent might gain an advantage by outspending his Peace and Freedom counterparts early in the election. In such a scenario, challengers might forego that risk and elect not to accept the expenditure limits.

Issue 2: Does the Lifting of Expenditure Limits in the Primary Election Also Lift the Expenditure Limits in the General Election?

Section 85402 establishes the rule that expenditure limits are lifted when an opposing candidate contributes personal funds in excess of those amounts. The statute does not indicate, however, whether lifting the limits in a primary election will have a

¹ Subdivision (b) of section 85401, however, allows a candidate who has rejected the limits in the primary election to file a statement of acceptance of the limits for the general election *if* the candidate did not exceed the expenditure limits in the primary election. (§ 85401, subd.(a).)

² "Same-party candidates" refers to candidates who belong to the same party as the candidate who has contributed personal funds to his or her campaign in excess of the expenditure limits.

corresponding effect on the limits in the general election. The question of "opponent" discussed above, however, falls away, for every candidate in a general election is an "opponent." Essentially, the Commission may decide a primary candidate's contribution of personal funds will: 1) have no effect on the general election limits, 2) affect the general election only if the contributing candidate in the primary advances to the general election, or 3) result in the lifting of the expenditure limits in the general election regardless of whether the contributing candidate advances.³ The advantages and disadvantages inherent in each approach may depend on the Commission's determination of the first issue - whether the primary limits will be lifted for all candidates or only same-party candidates.

Restricting the lifting of the limits to the primary election arguably advances a policy of supporting expenditure limits because it reduces the circumstances where the limits will be raised. On the other hand, lifting the limits in the general will allow the winning Peace and Freedom primary candidate in the scenario described earlier to compete on a more level playing field with the unchallenged Green Party candidate. Ultimately, this may discourage the incumbent from contributing personal funds to his or her campaign in excess of the limits because any advantage from doing so will be mitigated in the general election.⁴

Finally, since a candidate who contributes personal funds may transfer them forward to the general election without attribution, *that candidate will have an advantage in the general election even though he or she does not make another contribution of personal funds.* (§ 85317.) A compromise approach to address this situation is to allow the limits in the general election to be raised if the candidate who initially contributed personal funds to his or her campaign wins the primary and advances to the general election.

EMERGENCY REGULATION 18543

Attached as Exhibit B are three drafts of Proposed Regulation 18543, "Lifting of Voluntary Expenditure Limits." A brief description of each regulation and the various options within each, as well as a brief description of the pros and cons of each, is given below. For your convenience, a chart showing the provisions of each version is attached as Exhibit A. To reiterate, these regulations seek to address the consequence of a triggering event (contribution of personal funds to a candidate's campaign in excess of the expenditure limits) **when it occurs in a primary election**. The consequences of a triggering event during the general election can readily be gleaned from the statute itself.

³ It should be noted that the general election expenditure limits themselves are subject to the provisions of section 85402, such that even if the Commission decides there will be no impact in the general election from a primary election lifting of the limits, the limits may nevertheless be lifted in the general election if a candidate in the general election contributes personal funds in excess of the applicable expenditure limits. This contingency is provided for in subdivision (b) of "Version 1" and "Version 2" of the regulation drafts.

⁴ Of course, this depends on the rival's fundraising capacity under the circumstances or his capacity to respond even if there is money - i.e., if the limits are lifted at the last minute.

1. **Version 1:** This version of the regulation lifts the expenditure bans for *all* candidates in the primary election and all candidates in the general election, if the triggering event (personal contributions from a candidate) occurs during the primary election. Thus, if a Green Party candidate contributes personal funds in excess of the primary limits, the expenditure limits are lifted for all other candidates, including the Peace and Freedom primary candidates. These limits are lifted in the general election also, regardless of whether the Green Party candidate advances.

Pros and Cons: The primary advantage of this approach is that it removes, as much as possible, the risk of a candidate "guessing wrong" if the candidate opts to accept the expenditure limits. In this way, candidates would be encouraged to accept the limits because the risks associated with a self-funding candidate appearing later in the race are reduced. Candidates in other parties are better insulated from the potential disadvantage of having one's hands tied behind one's back while the other party's candidates take advantage of lifted limits. Such an approach acknowledges the fact that campaigning in a primary often reaches beyond the candidate's own party and is often designed to influence voters registered to other parties.

While arguably protecting candidates who accept the expenditure limits and thereby encouraging elections conducted under the limits, such a broad approach may result in fewer elections operating under the limits.

2. **Version 2:** In this version, as in the one above, the primary election limits are lifted for *all* candidates, regardless of party affiliation. The difference comes with respect to the general election. Here, two options are set forth. **Option 1** states the lifting of limits in the primary election does not affect the limits in the general election. The general election limits would be lifted only if a candidate in the general election contributes personal funds in excess of the limits during the general election. **Option 2** lifts the general election limits *if* the candidate who contributed personal funds in the primary *advances to the general election*. If that candidate loses the primary, the candidates who accepted the expenditure limits will remain bound by them in the general election.

Pros and Cons: With respect to the general election, this version arguably keeps a tighter lid on the expenditure limits by preventing them (Option 1) from being raised in the general election as a result of conduct in the primary election. Option 2 allows a certain leveling of the playing field during the general election in the event the candidate who contributes the personal funds in the primary advances to the general election. This equalization may be especially important if the candidate who contributed personal funds in the primary moves significant sums forward into the general.

3. **Version 3:** This version lifts the limits in primary elections *only* for those candidates in the *same party* as the candidate who contributes the personal funds. The language of **Option 1** and **Option 2** is identical to that of Version 2. This version, however, adds **Option 3**, stating the limits are lifted for *all* candidates in the general

election. Thus, even if the candidate who contributes personal funds in the primary election loses in the primary, the candidates going forward to the general election are not bound by the expenditure limits in the general.

Pros and Cons: This version gives the Commission three options in the general election if it decides that the wording of the statute permits only same-party candidates in the primary election to exceed the expenditure limits. Even if the Commission decides "opposing candidate" means candidates of a different party, the language of Options 2 and 3 allow for the leveling of the playing field in the general election. The primary purpose behind the language of Option 3 is that it acknowledges the advantage that candidates of one party may have if their limits are lifted in the primary while candidates in other parties remain bound by the limits.

Recommendations:

There is not a consensus among staff regarding which version is best. Each has logical pros and cons. Enforcement finds all versions of the regulation enforceable. Here, once the Commission makes the initial policy calls, the regulation will unfold easily.